

Lewis Roca Rothgerber Christie LLP

201 East Washington Street, Suite 1200
Phoenix, AZ 85004-2595
Telephone: 602.262.5311

Ryan D. Pont (State Bar No. 033391)
Direct Dial: 602.262.5313
Direct Fax: 602.734.3769
Email: rpont@lewisroca.com

Kyle W. Kellar (*Pro hac vice*)
Direct Dial: 626.683.4590
Direct Fax: 626.577.8800
Email: kkellar@lewisroca.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Wavve Americas, Inc., a Delaware corporation,

Plaintiff,

vs.

Unknown Registrant Of Kokoatv.Net;
Unknown Registrant Of Kokoa.Tv; And
Unknown Registrant Of Vidground.Com,

Defendants.

Case No. 2:23-cv-01819-MTL

**PLAINTIFF'S MOTION FOR
LEAVE TO SERVE DEFENDANT BY
ALTERNATIVE MEANS**

Plaintiff wAve Americas, Inc. (“wA” or “Plaintiff”), having now learned the true identity and location of the registrant of KOKOA.TV, KOKOATV.NET, and VIDGROUND.COM, respectfully requests that the Court permit wA to serve the First Amended Complaint (filed concurrently herewith) via email pursuant to Fed. Rule Civ. Proc. 4(f)(3).

wA filed the instant lawsuit on August 30, 2023, listing the unknown registrants of KOKOA.TV, KOKOATV.NET, and VIDGROUND.COM (the “Domain Names”) as defendants. (Dkt. No. 1). In response to wA’s third-party discovery against NameCheap, Inc. (“NameCheap”), the registrar responsible for the Domain Names, wA learned that each of the Domain Names is owned by Tumi Max, an individual residing in Thailand.

1 See Declaration of Kyle W. Kellar In Support of wA's Motion for Leave to Serve
 2 Defendant by Alternative Means ("Kellar Decl."), ¶ 2 (filed concurrently herewith). wA
 3 timely filed its First Amended Complaint replacing the "doe" defendants with Tumi Max.
 4
 5 wA now requests that the Court permit wA to serve Defendant via email pursuant Fed.
 6 Rule Civ. Proc. 4(f)(3) so that this lawsuit can efficiently proceed.

7 **I. LEGAL PRINCIPLES**

8 Fed. Rule Civ. Proc. 4(f) provides that:

9
 10 an individual ... may be served at a place not within any judicial
 11 district of the United States:

12 (1) by any internationally agreed means of service that is reasonably
 13 calculated to give notice, such as those authorized by the Hague Convention
 14 on the Service Abroad of Judicial and Extrajudicial Documents;
 15 (2) if there is no internationally agreed means, or if an international
 16 agreement allows but does not specify other means, by a method that is
 17 reasonably calculated to give notice:

18 (A) as prescribed by the foreign country's law for service in that
 19 country in an action in its courts of general jurisdiction;

20 (B) as the foreign authority directs in response to a letter rogatory or
 21 letter of request; or

22 (C) unless prohibited by the foreign country's law, by:

23 (i) delivering a copy of the summons and of the complaint to the
 24 individual personally; or

25 (ii) using any form of mail that the clerk addresses and sends to the
 26 individual and that requires a signed receipt; or

27 (3) by other means not prohibited by international agreement, as the court
 28 orders.

29
 30 The Ninth Circuit, in *Rio Properties, Inc v. Rio Intern. Interlink*, 284 F.3d 1007,
 31 1014 (9th Cir. 2002), stated that "as long as court-directed and not prohibited by an
 32 international agreement, service of process ordered under Rule 4(f)(3) may be
 33 accomplished in contravention of the laws of the foreign country." Indeed, "service of
 34 process under Rule 4(f)(3) is neither a 'last resort' nor 'extraordinary relief'" and "is
 35 merely one means among several which enables service of process on an international
 36 defendant." *Id.* at 1015 (quoting *Forum Fin. Group, LLC v. President & Fellows of*

Office Address

LEWIS ROCA

1 *Harvard College*, 199 F.R.D. 22, 23 (D. Me. 2001)). To avoid any doubt, the Ninth
2 Circuit clarified that “we hold that Rule 4(f)(3) is an equal means of effecting service of
3 process under the Federal Rules of Civil Procedure, and we commit to the sound
4 discretion of the district court the task of determining when the particularities and
5 necessities of a given case require alternate service of process under Rule 4(f)(3).” *Id.* at
6 1016.
7

8 Even when permitted by the Rules, “a method of service of process must also
9 comport with constitutional notions of due process.” *Id.* In other words, “the method of
10 service crafted by the district court must be ‘reasonably calculated, under all the
11 circumstances, to apprise interested parties of the pendency of the action and afford them
12 an opportunity to present their objections.’” *Id.* at 1016–17 (quoting *Mullane v. Cent.
13 Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).
14

16 **II. ARGUMENT**

17 This case revolves entirely around infringements of wA’s Intellectual Property rights
18 on the Internet via three interrelated websites—KOKOATV.NET, KOKOA.TV, and
19 VIDGROUND.COM. The owner of the Domain Names, and now the only Defendant in
20 this case, Tumi Max, is apparently an individual residing in Thailand. (Kellar Decl., ¶¶ 2–
21 3). Accordingly, and to properly and efficiently serve Defendant, wA requests that the
22 Court permit wA to serve Defendant via email pursuant to Fed. Rule Civ. Proc. 4(f)(3).
23

24 First, Thailand is not a signatory to the Hague Convention. *See Status Table:*
25 Hague Convention (available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17>); *Mongkol Muay Thai Corp. v. JG (Thailand) Co. Ltd.*, Case No. 22-cv-
26 00506-BAS-KSC, 2023 WL 5599613, at *3 (S.D. Cal. Aug. 29, 2023) (“As mentioned
27 28

Office Address

LEWIS ROCA

1 above, Thailand is not a signatory to the Hague Convention.”). Thus, service on
2 Defendant via email is permitted under Rule 4(f)(3). *See Id.; Kyjen Co., LLC v.*
3 *Individuals, Corps., Ltd. Liab. Cos., P'ships, & Uninc. Assocs. Identified on Sch. A to the*
4 *Compl.*, No. 23 Civ. 612 (JHR), 2023 WL 2330429, at *2 (S.D.N.Y. Mar. 2, 2023) (find
5 that “service by electronic means is permitted for the ... [d]efendants ... located in ...
6 Thailand”); *Facebook, Inc. v. Banana Ads, LLC*, No. C-11-3619 YGR, 2012 WL
7 1038752, at *2 (N.D. Cal. Mar. 27, 2012) (finding alternative service by email upon
8 defendant in Thailand not prohibited by international agreement and authorizing such
9 service under Rule 4(f)(3)).

10 Second, service on Defendant by email is reasonably calculated to apprise
11 Defendant of this litigation. As mentioned above, this litigation revolves entirely around
12 infringements occurring on the Internet via Defendant’s websites. Thus, emailing
13 Defendant at the email address he or she self-provided in connection with registering
14 those same websites is reasonably calculated to reach Defendant. Indeed, in registering
15 the Domain Names, Defendant was required to provide NameCheap with a valid email
16 address, which was then required to be actively verified by Defendant by clicking a
17 responsive link sent to that email address. *See* ICANN’s Whois Verification Process
18 (available at
19 <https://www.namecheap.com/support/knowledgebase/article.aspx/9305/5/icanns-whois-verification-process/>) (“When a **new domain** is registered, we will immediately send an
20 email to the Registrant email address specified for the domain.” ... “You must verify the
21 email address by clicking on the link within **15 calendar days** after registration. If you do
22

Office Address

LEWIS ROCA

1 not verify it within 15 calendar days, the domain will be suspended, and the DNS of the
2 domain name will be changed.”) (emphasis in original). NameCheap similarly informs
3 domain name registrants, such as Defendant, “you understand that it is important for you
4 to regularly monitor email sent to the email address associated with your account and
5 WHOIS contact information because, among other reasons, if a dispute arises regarding a
6 domain name(s) or other Service(s), you may lose your rights to the domain name(s) or
7 your right to receive the Service(s) if you do not respond appropriately to an email sent in
8 conjunction therewith.” NameCheap Registration Agreement (available at
9 <https://www.namecheap.com/legal/domains/registration-agreement/>). Thus, there is
10 substantial assurances that Defendant owns and is monitoring the email address associated
11 with the Domain Names at issue herein. There is no apparent similar process for verifying
12 Defendant’s physical address, which may or may not be valid.

13 Accordingly, because Defendant self-provided his or her email address to
14 NameCheap *and* verified it in the process of registering the Domain Names, service via
15 email is not only reasonably calculated to provide Defendant with actual notice of this
16 lawsuit but is the most likely method to achieve this end. See *Facebook*, 2012 WL
17 1038752, at *2 (holding that “service by email appears to be not only reasonably
18 calculated to provide actual notice to the Foreign Defendants but the method most likely
19 to apprise the Foreign Defendants of the action”).

20 **III. CONCLUSION**

21 For the above reasons, wA respectfully requests that the Court permit it to serve
22 Defendant via email at tumi993354@protonmail.com pursuant to Fed. Rule Civ. Proc.
23 4(f)(3).

Office Address

LEWIS ROCA

1 Dated: September 13, 2023.
2
3

4 Respectfully submitted,
5
6

7 LEWIS ROCA ROTHGERBER CHRISTIE
8 LLP
9
10

11 By: /s/ Ryan D. Pont
12 Ryan D. Pont
13 Attorneys for Plaintiff Wavve Americas, Inc.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Office Address

LEWIS ROCA